

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JOSEPH LASTER, JR., DECEASED
Claimant

VS.

AB PLUMBING, LLC
KWALITY LIVING, LLC¹
Uninsured Respondents

AND

KANSAS WORKERS COMP FUND

Docket No. 1,044,841

ORDER

Deanna Mitchem and Joseph Laster, III, request review of the December 21, 2010 Award by Administrative Law Judge (ALJ) Steven J. Howard. The Board heard oral argument on April 5, 2011.

APPEARANCES

Michael R. Wallace, of Shawnee Mission, Kansas, appeared for claimant, Deanna Mitchem, claimant's common law wife. James E. Martin, of Overland Park, Kansas, appeared for claimant, Joseph Laster, III, claimant's son. Randall W. Schroer, of Kansas City, Missouri, appeared for respondent, A.B. Plumbing, LLC (A.B. Plumbing). Timothy G. Elliott, of Overland Park, Kansas, appeared for the Kansas Workers Compensation Fund.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. At oral argument, the parties confirmed that there is no dispute as to the common law marriage between Joseph Laster, Jr. (Decedent) and Deanna Mitchem. Thus, that

¹ Kwality was dismissed without prejudice from this action on November 2, 2010 after the Regular Hearing, therefore Kwality's counsel, Richard Fisk was not notified of this appeal from the Award.

particular finding within the Award can be summarily affirmed. Likewise, there is no dispute that Joseph Laster, III (Decedent's Son) is the sole dependent child of the Decedent but was not, as found in the Award, a child born to Decedent and Deanna Mitchem. Rather, he was born to Decedent and Marcia Ellis. Therefore, the parties agree that the Award must be modified to accurately reflect this fact.

ISSUES

The ALJ concluded that although the Decedent was working for Preston Carpenter (Carpenter), a plumber, at the time of his death, Carpenter was an independent contractor who had been retained by A.B. Plumbing to perform work on a rental property owned by Kquality Living, LLC. And because Carpenter was an independent contractor whose own payroll did not meet the statutory threshold set forth in K.S.A. 44-505(a)(2), the Kansas Workers Compensation Act did not apply to Decedent's accident. As a result, neither Ms. Mitchem or Decedent's Son were entitled to death benefits.

Both Deanna Mitchem and Decedent's Son have appealed this decision alleging the ALJ erred. First, they both argue that the greater weight of the credible evidence supports their contention that Carpenter was employed by A.B. Plumbing, as opposed to an independent contractor, and Carpenter was authorized to hire additional help, such as Decedent, to complete this plumbing job. And second, because the monies paid to Carpenter by A.B. Plumbing in 2009 exceeded the \$20,000 threshold, the Kansas Workers Compensation Act applies and authorizes an award of death benefits to both.

Respondent argues that the Award should be affirmed in all respects. Respondent maintains that if the Decedent was hired, he was hired and controlled by Carpenter, an independent contractor to perform work under Carpenter's direction, and not by A.B. Plumbing. Thus, A.B. Plumbing has no legal responsibility for Decedent's death.

The Fund contends that if respondent is found liable for benefits, the claim must be remanded to the ALJ for further findings with respect to the solvency of either responsible party.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Sometime in January 2009, Kquality Living, LLC was contacted about a plumbing problem at a home it owned in Kansas City, Kansas. The home was occupied by Decedent, Deanna Mitchem and her daughter. Kquality Living, LLC contacted Tom Super, owner of A.B. Plumbing, and retained his company to identify and repair the plumbing problem.

Tom Super (Super) testified that he is an electrical and plumbing contractor who owns two companies, one of which is A.B. Plumbing. According to Super, he had a single individual who he called upon to perform plumbing services when the need arose. He also testified that he does not do any of the plumbing work himself and never has. Rather, he merely answers the phone and when asked for plumbing assistance, he retains others to perform the work, charging a premium for his services. He pays the one worker (Carpenter) he uses for his services as if he were an independent contractor, providing a 1099 at the end of the tax year. Neither Super or A.B. Plumbing provide Carpenter with any sort of tools or equipment, although if something is required, Carpenter will purchase the item and get reimbursement from A.B. Plumbing. According to Super, he does not control the method or delivery of these plumbing services. Rather, he provides an address and pays Carpenter by the hour. Payments made by the customer are done by check made payable to A.B. Plumbing. Super would then in turn pay Carpenter. If there was a problem with a job and a customer complained, Super would send Carpenter back out to the job to address the concerns.

In 2008, the first year of A.B. Plumbing's existence, A.B. Plumbing paid \$5,016.74 to Carpenter for plumbing services.² It does not appear from this record that any other individual was paid for such plumbing services. In calendar year 2009, Carpenter was paid approximately \$46,000 for his services. Carpenter is the only plumber retained by A.B. Plumbing to perform services. He was paid \$18 or \$20 per hour, depending on the testimony. Carpenter did not wear any sort of uniform, nor is there any evidence in the record that there was any outward appearance or markings of a relationship between Carpenter and A.B. Plumbing.

Carpenter had, in the past, hired others to help him in order to complete the work assigned to him by A.B. Plumbing. In fact, Super acknowledged this fact and testified that there was no prohibition against doing so. But at no time did A.B. Plumbing pay any of Carpenter's helpers directly. Payments to the helpers always came from Carpenter. And Carpenter had done plumbing jobs for others and had no obligation to take each and every service call made to him by A.B. Plumbing.

In January 2009, Carpenter was dispatched to Decedent's home in Kansas City, Kansas to repair the sewer line. Carpenter determined the line had collapsed and needed to be dug up and replaced. According to Carpenter, he needed additional help to finish the job and his normal helper failed to show up for the job. He asked Ms. Mitchem if Decedent was home as he hoped to have him help with the plumbing project and pay him \$10 per hour for a few hours work removing dirt from an 8 foot hole. It was the dirt removal effort that Carpenter wanted Decedent to help with. Carpenter says by January 23, 2009, the

² It is worth noting that there is some ambiguity in the record as to when A.B. Plumbing actually came into existence. Super seemed to change his testimony, first testifying that the business began in July 2008 and then later, it was October 2008. In any event, the only individual hired by A.B. Plumbing to perform services (either as an independent contractor or an employee) was Carpenter.

8 foot hole in the back yard was completed. Carpenter maintains there was no need for Decedent to get in the hole at this point in the project as the hole was completed.

Ms. Mitchem testified that she was present when Carpenter negotiated with Decedent about helping dig the hole. She testified that Carpenter agreed to pay Decedent \$100 per day and that Decedent actually worked 3 days, helping dig the hole. Ms. Mitchem would periodically go out and check on Decedent while he was working on the project. On the day in question, Ms. Mitchem's daughter inquired about Decedent's whereabouts as she did not see him in the backyard. Ms. Mitchem went to the backyard and found the hole collapsed and Decedent was buried under the dirt.

Carpenter testified that he had left the yard to retrieve additional parts and upon his return, discovered claimant was in the collapsed hole. Carpenter maintains Decedent had no need to be in the hole. He was hired to take the buckets of dirt away from the area and was not hired to dig the hole. Thus, he maintains Decedent jumped into the hole on his own and not as part of this job activity.

Decedent suffocated in the hole and died. This claim followed. The determinative issue in this appeal is whether the Kansas Workers Compensation Act (Act) applies to the parties' relationship. There is no apparent dispute that Carpenter hired Decedent to work on this plumbing project, although the specific rate of pay and duration of the project is contested. Likewise there is no dispute that A.B. Plumbing hired Carpenter to perform services and that Carpenter was paid in excess of \$5,000 in 2008 and over \$46,000 during 2009. But the nature of the individual relationship is hotly contested.

The ALJ concluded that Decedent was an employee of Carpenter, and no one has disputed this finding. Accordingly, that aspect of the Award is affirmed. However, the ALJ went on to conclude that Carpenter was not subject to the Act as there was no evidence that his payroll for employees exceeded the statutory threshold.

K.S.A. 44-505(a) exempts from application of the Kansas Workers Compensation Act the following:

(2) any employment . . . wherein the employer had a total gross annual payroll for the preceding calendar year of not more than \$20,000 for all employees **and** wherein the employer **reasonably estimates** that such employer will not have a total gross annual payroll for the current calendar year of more than \$20,000 for all employees, except that no wages paid to an employee who is a member of the employer's family by marriage or consanguinity shall be included as part of the total gross annual payroll of such employer for purposes of this subsection; . . . (emphasis added).

In order to be subject to the provisions of the Act, the above statute establishes a two-prong test. First, the employer must have had an annual payroll for the preceding

calendar year greater than \$20,000. Secondly, the employer must reasonably estimate that it will have a gross annual payroll for the current calendar year of more than \$20,000 for all employees, excluding family members. In *Fetzer*³, the Kansas Court of Appeals interpreted the current calendar year as referring to the calendar year of the injury.

Here, there is no evidence as to Carpenter's payroll for the preceding year, 2008. All that is known is how much he *earned* from his work for A.B. Plumbing. And the only evidence of his payroll in 2009 (the current year, as that term is used in the statute) was that he *earned* over \$46,000, again from his work for A.B. Plumbing. Again, there is no evidence as to the amount he paid his employees in 2009, if any. Thus, the Board finds the ALJ was correct in his conclusion that Carpenter is not subject to the provisions of the Act.

The ALJ went on to conclude that A.B. Plumbing "does not fall within the application of the Kansas Workers' Compensation Act under the provision of K[.]S[.]A[.] 44-501(a)(2) [sic]."⁴ He reasoned that "[t]he evidence clearly discloses that Preston M. Carpenter was an independent contractor, received 1099s from A.B. Plumbing, and for the reasons cited above herein, was never an employee of A.B. Plumbing."⁵

It appears that the ALJ did not consider whether A.B. Plumbing fell within the purview of the Act with respect to the statutory payroll threshold. This may have been because the statute, K.S.A. 44-505(a)(2) impliedly excludes payments to bona fide independent contractors. Thus, the ALJ may well have concluded that because Carpenter was an independent contractor, which would sever any liability exposure to A.B. Plumbing, there was no need to further consider the application of the Act as it related to A.B. Plumbing and its payroll.

However, the Board has reviewed the evidence contained within this record and concludes, contrary to the ALJ's finding, that Carpenter was A.B. Plumbing's contractor for purposes of this job as that term is used in K.S.A. 44-503.

K.S.A. 44-503(a) provides as follows:

Where any person (in this section referred to as principal) undertakes to execute any work which is a part of the principal's trade or business or which the principal has contracted to perform and contracts with any other person (in this section referred to as the contractor) for the execution by or under the contractor of the whole or any part of the work undertaken by the principal, the principal shall be

³ *Fitzer v. Boling*, 19 Kan. App. 2d 262, 867 P.2d 1067 (1994).

⁴ ALJ Award (Dec. 21, 2010) at 6. The reference is incorrect. It should be K.S.A. 44-505(a)(2).

⁵ *Id.*

liable to pay to any worker employed in the execution of the work any compensation under the workers compensation act which the principal would have been liable to pay if that worker had been immediately employed by the principal...

Under these facts, the Board is persuaded that A.B. Plumbing is, in the language of the statute, a principal. It contracted with Carpenter to repair the sewer line in the Decedent's home. A.B. Plumbing, through Tom Super, does no plumbing work itself. Rather, Super merely picks up the phone and hires another, typically Carpenter, to perform the work. Super even refers to himself as a "plumbing contractor".⁶ And although A.B. Plumbing attempts to distance itself from the employment situation by classifying Carpenter as an independent contractor (no doubt in the hopes of avoiding workers compensation coverage) this relationship mirrors the very one contemplated in K.S.A. 44-503. A.B. Plumbing is the principal, who provides plumbing services to the public and when called for service, hires Carpenter, the contractor, to perform the services. At no point does Super himself provide any services. He merely contacts Carpenter to do the work. The statute envisions a situation where the contractor hires workers to perform the work originally undertaken by the principal. Simply put, Carpenter and those he hires, including Decedent, are statutory employees of A.B. Plumbing. And when there are injuries to those workers, like this Decedent, there is the potential for liability.

Although the Board expressly finds that the relationship between A.B. Plumbing and Carpenter is one of statutory employer/employee under K.S.A. 44-503, the analysis is not complete as A.B. Plumbing is still subject to the payroll threshold set forth in K.S.A. 44-505(a)(2). But having concluded that Carpenter is a statutory employee and not an independent contractor, the monies paid to Carpenter should be included in this calculation.

Nonetheless, as noted before, the payroll figures presented in this record do not satisfy the statutory requirements. In 2008 (the preceding year) A.B. Plumbing paid approximately \$5,000 in wages to Carpenter and there is no evidence that other monies were paid in that year. Thus, A.B. Plumbing does not meet the first criteria set forth in the statute. In 2009, the only evidence of wages was the \$46,000 paid to Carpenter. According to Carpenter, as of January 2009, he had no expectation of what he would make from A.B. Plumbing during that calendar year. From day to day he did not know how long the business relationship might exist. Super testified that he had no real expectation of how much business he could expect in 2009.⁷ While Carpenter went on to earn significant wages from A.B. Plumbing that calendar year, there is insufficient evidence within this record to find that the employer/principal (A.B. Plumbing) could reasonably estimate that

⁶ Super Depo. (Feb. 5, 2009) at 6-7.

⁷ It is worth noting that Super was anything but forthcoming in his testimony. His explanation of how he came to hire Carpenter varied from deposition to deposition. Thus, his credibility is suspect. But given the balance of the Board's decision, his credibility on this issue is largely irrelevant.

it would have had a payroll in excess of \$20,000 that year, at least as of the time of Decedent's accident. Even if there had been such a reasonable belief, the uncontroverted evidence is that in 2008, the payroll for the employer was just over \$5,000. And without a payroll exceeding \$20,000 in 2008, both elements of the statute cannot be met. It follows then that although the Board has concluded that A.B. Plumbing is the principal in this matter and that under K.S.A. 44-503 there is the potential for liability, A.B. Plumbing is not subject to the provisions of the Act by virtue of K.S.A. 44-505. As a result, A.B. Plumbing has no liability for workers compensation benefits in this matter.

Given this result, there is no need to address the Fund's request for remand as the issue is moot.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Steven J. Howard dated December 21, 2010, is affirmed (except as to the finding of Decedent's Son's parentage which is corrected on page 1 of this opinion) albeit it for different legal reasoning, which is set forth above.

IT IS SO ORDERED.

Dated this _____ day of April 2011.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Michael R. Wallace, Attorney for Claimant, Deanna Mitchem
James E. Martin, Attorney for Claimant, Joseph Laster, III
Randall W. Schroer, Attorney for Respondent, AB Plumbing, LLC
Timothy G. Elliott, Attorney for the Kansas Workers Compensation Fund